

APR 16 2008

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WAYNE JASON MARSHALL,

Defendant - Appellant.

No. 07-50442

D.C. No. CR-03-00286-JVS

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Central District of California  
James V. Selna, District Judge, Presiding

Argued and Submitted March 5, 2008  
Pasadena, California

Before: GOODWIN, SCHROEDER, and TALLMAN, Circuit Judges.

Wayne Jason Marshall pleaded guilty to one count of bank robbery, in violation of 18 U.S.C. § 2113(a). At sentencing, the district court found that Marshall qualified as a “career offender” under U.S.S.G. § 4B1.1, and sentenced him to 120 months’ imprisonment. Marshall appeals his sentence contending that

---

<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

he does not qualify as a career offender because the district court erred in finding that his prior conviction under California Vehicle Code § 2800.2 (“§ 2800.2”) was a “crime of violence” under U.S.S.G. § 4B1.2(a). We agree.

We hold that Marshall’s conviction under § 2800.2, for flight from a pursuing police officer in willful or wanton disregard for the safety of persons or property, is not categorically a crime of violence. *See United States v. Jennings*, No. 06-30190, 2008 WL 282366, at \*7 (9th Cir. Feb. 4, 2008); *United States v. Kelly*, 422 F.3d 889, 895 (9th Cir. 2005) (holding that a Washington state conviction for attempting to elude a pursuing police officer was not a crime of violence because the statute criminalized conduct that did not “present[] a serious potential risk of physical injury to another,” as required by U.S.S.G. § 4B1.2(a)(2)).

Under the modified categorical approach, we also hold that Marshall’s § 2800.2 conviction is not a crime of violence. Marshall’s statement in his plea agreement that he was “driving recklessly” is insufficient to establish that he was convicted of a crime of violence. *See Kelly*, 422 F.3d at 896.

Because Marshall’s prior conviction under § 2800.2 does not, under our court’s case law, constitute a crime of violence, the district court erred in

sentencing him as a career offender. We therefore vacate Marshall's sentence and remand for resentencing.

**VACATE and REMAND.**